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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~340~~ 13

WILLIAM H. BLACK AND RUTH F. BLACK,
Petitioners,

vs.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER I. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. McBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HUGH D. STITES AND LARRY STITES, INFANTS UNDER THE AGE OF TWENTY-ONE YEARS, BY LOIS L. STITES, THEIR MOTHER AND NEXT FRIEND; KENNETH D. CONSTANT; HAZEL CONSTANT; J. R. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER AND FRED E. WINDISH, Co-Receivers of BLACK-MARSHALL OIL COMPANY, A CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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October, 1956.

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QUESTIONS PRESENTED.

1. The jurisdictional question actually presented is whether an independent jurisdictional ground is needed

to support the intervention of an additional member of the class in a class suit involving interdependent claims asserted by representatives fully meeting the requirements for diversity jurisdiction. This class action is not, as is assumed in petitioners' statement of a much mooted jurisdictional question, one based solely upon the presence of common questions of law and fact in otherwise separate and distinct claims. The complaint sought, and the decision of the Court of Appeals requires, a proportionate distribution of the proceeds of a common fraud, held in constructive trust, among the members of the class of defrauded persons. The several claims of the members of the class against those proceeds are so related that the amount of each depends upon the disposition of the others. The several claims involved are not, therefore, separate and distinct but are interdependent.

2. Petitioners' second question as stated commingles two separate questions: (a) whether the Court of Appeals misapplied substantive law and (b) whether it overturned findings of fact in the face of Rule 52(a) of the Federal rules of Civil Procedure. Only the first of these questions is really presented. The decision of the Court of Appeals does not depend on setting aside findings of fact, regardless of whether they were or were not "clearly erroneous," but on conclusions of law based on undisturbed findings and undisputed facts.

STATEMENT.

The basic facts in this case, as found by both courts below and not denied by petitioners, are that respondents were the victims of a cruel fraud of which petitioner W. H. Black was the direct and immense beneficiary. The principal question presented by the action was simply whether Black is liable to account for the proceeds which accrued to him from that fraud. Although these proposi-

tions are basic and undeniable they do not emerge from the Statement in the Petition.

Petitioners' principal point is that the Court of Appeals "so disregarded the rules of appellate review and the function of a Federal Court of Appeals as to require reversal by this Court." Petitioners accuse the Court of Appeals of a disregard of the trial court's findings, of the evidence, and of settled legal doctrine so gross that the charge amounts to one of bad faith.[1] Fairness to that court would have required a compete and undistorted Statement showing the claims involved, the facts established by the evidence, and the differences between the decisions of the trial court and the Court of Appeals. This has not been provided.

Petitioners' statement of the individual claims places great emphasis on allegations not included in the amended complaint on which the case was tried and not material to the claims as upheld by the Court of Appeals. (Compare R. 2-10 with R. 12-19.)

The individual and derivative claims as alleged and upheld were more accurately stated by the Court of Appeals as follows:

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[1] "After this departure from what the record shows and the trial court found in fact occurred, the majority below was forced once more to reject settled legal doctrine in order to enhance the respondents' ultimate recovery * * *" (Petition, p. 28.)

"On an unprecedented theory which reflects a complete failure to attempt to determine applicable law, the majority of the court below * * *" (Petition, p. 28.)

"In achieving them [errors of substantive law] the majority of the court below was persistent, ingenious and, as regards legal principles, wholly original." (Petition, p. 29.)

"So the majority withdraw this highly unsuccessful effort and tried again * * *" (Petition, p. 30.)

"To achieve this conclusion the court entirely reconstructs the negotiations and agreements between the parties as found by the District Court. This is rigorous but at least it produced the desired result." (Petition, p. 31.)

"The first [claim] is a spurious action by the appellant stockholders of the Black-Marshall Oil Company, generally known as the Aledo Group, who claim to have been induced to part with their stock in the company by the false and fraudulent representations of the appellee, Black, acting through his agent, Ives, to the effect that producing properties of the company were being sold to yield the stockholders $10.00 and $12.00 a share, when in truth and in fact, the properties were not being sold as represented, and were not sold until 1947, when Black had acquired all of the stock of the appellants with corporate funds; that after having so acquired the stock and retiring part of it, he sold the remaining majority stock to yield himself and his family $51.06 a share. The prayer is for a decree setting aside the sale of the stock to Black, and the recovery of the profits realized by him in a subsequent sale.

"The second stated claim is in the nature of a derivative action by the individual stockholders and an original action by the co-receivers of Black-Marshall to recover on behalf of the corporation 32,457.50 shares of the company stock alleged to have been surreptitiously issued to Black and sold by him in 1947 for $51.06 a share. The consolidated claims seek to impress a constructive trust upon the proceeds of the sale of the stock for the benefit of the corporation and its shareholders." (Petition, App. p. 51; see R. 12-19, 26-29, 43-45, 51, 57-72.)

A statement of the facts giving rise to these claims and of the bases of the decisions of the trial court and the Court of Appeals would have placed in its true light the imputation of an improper motive to the Court of Appeals.

The undisputed facts were as follows:

Early in 1938 W. H. Black went to Illinois for the purpose of participating in oil developments in that state. (R. 616-17, 1149.) His previous experience[2] in numerous

[2] This experience included a conviction on five counts of an indictment charging the unlawful use of the mails in furtherance

other areas had been unprofitable and it was necessary for him to establish a source of funds to finance his proposed operations. (R. 617, 1225.) To advance this purpose Black utilized the services of Dale G. Ives, of Aledo, Illinois, a small community in which Ives was an attorney, many of the respondents being numbered among his clients and acquaintances. (R. 146-47, 189, 191-92, 617, 1221.) As a result of these contacts, the Petroleum Investment Company was formed in the fall of 1938. (R. 616-17, 1222.) The agreement establishing that enterprise designated Black as party of the first part and the group of men and women who had been induced to participate in the venture as parties of the second part. (R. 617-18; Ex. 4, R. 1524-25.) It recited the purpose of the association to be to lease and develop oil properties, and set out the expert qualifications of Black with respect to activities of that character. It provided that Black was to receive 25% of all net profits for his services and that the parties of the second part were to receive 75% of the net profits, apportioned according to the relative amounts of their respective investments. Even at this early stage of his dealings with the Aledo people, Black had persuaded them to put their full trust in him. (R. 146, 619, 1223.) This is reflected in the following provision of the agreement with the Aledo group, which included many of the respondents herein:

> "It is further mutually agreed by and between the parties hereto, that the party of the first part shall be the authorized agent of the parties of the second part, to transact all business of every kind and nature under and in connection with said agreement without inter-

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of a scheme to defraud, the scheme having involved the acquisition and development of oil and gas leases. (R. 1220; No. 1997 Cr., District Court of the United States for the Southern District of Texas; judgment of conviction entered on December 16, 1924; Hon. J. C. Hutcheson, Jr., presiding.)

ference from any parties of the second part." (Ex. 4, R. 1524-25.)

After several months of unproductive drilling in southern Illinois, Black moved his operations to Kansas, where he joined another promoter, Deering J. Marshall. (R. 145, 190, 620-21, 1227-29.) Marshall was to secure leases and Black to do the financing. (R. 1150.) Five leases were acquired in Kansas, all of which were subsequently transferred to the Black-Marshall Oil Company. (R. 147, 150-51, 190, 194, 630-31, 637, 641-42; Ex. 65, R. 349-50.) During this period Ives, on Black's behalf, continued to solicit contributions from the Aledo group which were transmitted to Black. (R. 626-27, 1222-23, 1241-42, 1469.) In his answers to interrogatories Black admitted that during the period of operations in Kansas, prior to the incorporation of the Black-Marshall Oil Company, he received $30,000.00 from this source, for use in acquiring and developing the Kansas leases. (R. 231.) Black's testimony on cross-examination shows that the total out of pocket cost of acquiring and developing the leases, including his personal expenses, was substantially less than the total funds contributed by the Aledo group. (R. 1251-61; Ex. 10, R. 228-31.)

As matters progressed in Kansas, Black proposed to the Aledo group the formation of a corporation to replace the Petroleum Investment Company. (R. 639, 1251, Ex. 8, R. 226-27.) The incorporation meeting of Black-Marshall Oil Company was held at Ives' office in Aledo, Illinois, on January 11, 1940, and was attended by Ives, Black and the other members of the Petroleum Investment Company. (R. 639-40.) At this meeting the Aledo people were told by Black and Ives that they would receive stock in the new company on the basis of their total prior contributions, at the rate of a share of common for each $2 invested and a share of preferred for each $4. (R. 148-51, 192-94, 241-

43, 303-06, 417-18, 469-70.) A stock list had been prepared in advance of the meeting, showing the number of shares to be issued to each investor, and on this list the amount of stock to be issued to Black was set at 11,000 shares or less. (R. 148, 192-93, 241, 418, 644-45.) When the stock was actually issued on January 23, 1940, Black received 10,000 shares of common and 1,000 shares of preferred. (Ex. 97, R. 1557-61; Ex. 101, R. 1569-74.) In addition, however, some unknown person (both Black and Ives denied doing it) filled out certificates 5 to 14, inclusive (which had been signed by Black as President but not by Ives as Secretary), to "W. H. Black et al." for 64,870 shares of common stock. (Ex. 97, R. 1557-61; Ex. 101, R. 1569.) Black denied that these certificates were ever validly issued or, in fact, issued at all. (R. 1285-87.) Subsequently, the minutes of the 1941 meeting at Aledo and the stock list presented at that meeting, presided over by Black, showed Black as the holder of only 11,000 shares. (Ex. I, R. 1767-68; R. 244, 474-75, 491, 550-51.) On the day of that meeting, however, certificates 5 to 14, inclusive, were marked cancelled and the 64,870 shares represented thereby were issued to "W. H. Black" on new certificates signed by Black and Ives, each stub bearing the notation "Correction of name only." (Exs. 97, 98; R. 1559-63.) When examined as to this action Black testified: "I don't propose to explain because I can't explain it, sir." (R. 1289-92.) Black turned over half these shares to Marshall and kept the other half. (R. 1192, 1206, 1479.) Ultimately he sold that half of the 64,870 shares thus issued for $51.06 per share.[2] (Ex. 98, R. 1561-63; Ex. 99, R. 1564; R. 874.)

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[2] The trial court found: "Black and Marshall were issued 10,000 shares common and 1,000 shares preferred individually, and were issued 64,870 shares which were carried on the books as Black et al., for the partnership interest of Black and Marshall in the original five leases." (Finding VI, Petition, App. p. 7.)

The 64,870 shares thus issued, together with all the shares originally issued to Black, Marshall and the members of the Aledo group, were charged on the books of the Company against the five Kansas leases, the total thus charged being 122,500 shares of common and 9,055 shares of preferred. (R. 1157, 1281, 1289; Ex. R, R. 1845.)

At the incorporation meeting, Black was elected president, chairman of the board of directors, chairman of the finance committee and chairman of the executive committee. Ives became a director and secretary-treasurer. (Ex. I, R. 1721-22.) They continued to hold those positions until the company was dissolved in 1947. (R. 420.)

Throughout the existence of the Petroleum Investment Company Ives had served as Black's agent in Aledo. (R. 146, 620-21, 1222.) Practically all funds for transmission to Black had been given to Ives. (R. 1226.) All information, particularly with respect to the Kansas operations, had come from Black to the Aledo people through Ives. (R. 621-22, 1295-96; Exs. 6-11, R. 223-34.) At the incorporation meeting, Black told the Aledo people that Ives would continue as he had in the past to act as Black's representative in his dealings with the Aledo people. (R. 244-45.) At the 1941 corporate meeting held at Aledo, Black again assured the Aledo people that Ives would be his representative with respect to all Black-Marshall matters and substantially the same statement was repeated at the only other stockholders' meeting held in Aledo, that of January, 1944. (R. 152-53, 158, 197, 201, 244-45, 266, 281, 358, 361, 387, 392-93.) Black testified as to Ives' agency, on direct examination, as follows:

The court made no reference, however, to the circumstances under which the 64,870 shares were issued. The Court of Appeals considered those circumstances decisive in concluding that they were purely promotional stock issued "surreptitiously, covertly, and we say fraudulently, to Black." (Petition, App. pp. 65-66.)

"Q. All right, now, do you remember telling them that you were constituting Dale Ives as your agent to act for you in all matters?

"A. I expect I did, because everybody—they were all wanting information from time to time, day after day, and I said I just can't possibly—we had such a small organization—I believe the first two years we didn't even have a secretary. I think pretty near all the letters we had—the girl could type but she couldn't take dictation—and I think most of the letters we just had to write in longhand or use a telephone, and I believe, I might have told them that, sir." (R. 1168-69.)

The manner in which this relationship between Black, Ives and the Aledo people was fostered and developed is shown by a mass of correspondence introduced by petitioners themselves. (R. 1296.)

By means of an extensive campaign in 1943, Black purchased most of the Black-Marshall stock held in Chicago (Exs. 17-23, R. 287-95.) Immediately thereafter the chain of events which ultimately resulted in depriving the Aledo group of their shares began. The basis for this result was laid at the January, 1944 stockholders meeting. The stockholders were concerned with getting a return on their stock, and after a discussion of various methods, Black was authorized to sell the *producing* properties only for a sum sufficient to net the stockholders not less than $8.00 per share. (R. 280-81, 391-92.) Black advised the stockholders that he would keep them informed through Ives with respect to any sale. (R. 158, 201, 308, 392-93, 476, 536, 1296.)

In the course of subsequent negotiations with National Cooperative Refinery Association (N. C. R. A.), Black reached an agreement by which he was to procure 51% of the Black-Marshall stock to turn over to N. C. R. A. (Ex. 344, R. 1659-60.) This deal fell through a few days

later and Black instead made arrangements with N. C. R. A. for financial support of an extensive drilling campaign. (Ex. 345, R. 1660-62.) In the meantime, however, Black had communicated the terms of the proposed deal to Ives. (Ex. 122, R. 1590; R. 1312-14.) In a letter of May 14, 1944, Ives referred to the failure of the deal with N. C. R. A. and advised Black that he had had "it worked out so that we would buy one-half of the stock held here for $10.00 per share and pay a part of it when we made the deal with Co-op and the balance next year * * *." (Ex. 122, R. 1590.)

On May 18, 1944, Black wrote Ives and asked him to "write or call me and tell me the number of shares you think could be acquired in Illinois." (Ex. 123, R. 763.) Thereafter, sometime in June of 1944, *Ives told the Aledo people that Black had called him and had directed him to tell the stockholders that the producing properties had been sold; that it was necessary for them to send in one-half of the stock to bind the deal; that the sale price would net each one about $10.00 per share on the first one-half of their stock and probably more on the second one-half which was to be turned in at a later date; that the other undeveloped leases were being retained; and that two years after completion of the sale a new company would be started for the purpose of developing those properties.* (R. 679-82, 158-60; Ex. 12, R. 233-34.)

On the basis of these misrepresentations, respondents turned in the first one-half of their stock. (R. 159-62, 201-02, 246-47, 269-70, 281, 310-11, 328-29, 362-63, 394-95, 422-23, 449, 451-52, 476-77, 494-95, 508, 521-22, 536-37, 546, 593-94, 926-27, 942-43.) Black then sent the Company plane to bring Ives and the stock to Kansas. (R. 682.) Black also arranged a transfer of 5,000 shares to A. W. Kincade, a Wichita banker, and 10,000 shares to each of two men, Roos and Gill, whom Kincade had brought in on

the deal. (Ex. 100, R. 1565-67; Ex. 102, R. 1574-75.) The stock, which had been acquired in Aledo at $10.00 per share, was sold to Roos and Gill for $12.50 per share. (R. 888; Ex. 111, R. 601-02.) Their checks, totaling $250,000, were deposited in Black's account and the funds were immediately transmitted to Ives on Black's order to be used in paying for the stock. (Ex. 89, R. 1541-42, Ex. 104, R. 581; Ex. 111, R. 601-02; R. 889-90.) Black and Kincade then paid a commission of $10,000 to a George Heiser and the remaining $40,000 profit was divided between Black and Kincade. (R. 1321-23.)

The additional shares acquired from the Aledo group in 1944, totalling 11,714, were paid for by the use of Company funds. (Ex. 88, R. 1541; R. 872-73, 890, 1333-34.) The money was sent to Ives and deposited in his special account. (R. 888-90; Ex. 87, R. 1540; Ex. 89, R. 1541-42.) On the Company records the funds were charged to Black's stock account. (Ex. 87, R. 1540; Ex. 88, R. 1541.) On August 15, 1946, Black transferred these shares to himself on Certificate No. 398. (Ex. 100, R. 1567-68; Ex. 119, R. 1588.) In June of 1947 Black sold this stock to N. C. R. A. for $51.06 per share, realizing a profit of about $500,000 after settling his account with the Company out of the proceeds. (R. 874-75, 889-90; Ex. 100, R. 1567-68.)

Late in 1944 the Aledo people received checks written on Ives' special account, in which the money from Black had been deposited, totalling $10.00 per share. (R. 685-86, 162, 202, 247, 269, 281-82, 311, 329, 363, 396, 423, 449, 451, 477, 494-95, 508, 522, 537; Ex. 89, R. 1541-42.) Those who had turned in more than one-half of their stock received the excess on new certificates. (R. 160-61, 202, 269, 310, 449, 452, 537.)

Thus, at this time, Black, with Ives' assistance, had secured one-half of the Aledo stock. Although some had

been resold to Roos, Gill and Kincade, Black had 11,714 shares purchased by him with company funds in his lock box at Great Bend. (R. 857-58, 1351-52, 1354.) The resale to Gill and Kincade was, moreover, only temporary, for in the fall of 1945, at about the same time that $12 per share was being paid for the rest of the Aledo stock, Black reacquired their stock by paying them $17.50 per share out of Company funds. (Exs. 115, 116, R. 1581-83.)

In March of 1945, Kincade wrote to Black suggesting a sale of the Company's *producing properties*. (Ex. 106, R. 582-84.) He further suggested that it would be desirable "to give some thought in advance of such sale of eliminating the greater part of a large family of stockholders." (Ex. 106, R. 583-84.) Black and Kincade submitted the matter to two accounting firms for their advice as to the exact procedure to be followed. (Ex. 278, R. 1607-10.) The reply from the accounting firms, dated August 24, 1945, reveals the plan of action proposed in March of 1945. (Ex. 106, R. 582-84.) The second and fourth paragraphs of that letter to Black and Kincade are particularly significant:

> "You have informed us that the present outstanding capital stock of the corporation is represented by 173,000 shares, no par value, divided about as follows:
>
> | | |
> |---|---|
> | Black and Kincade | 74,000 |
> | Deering Marshall | 30,000 |
> | Others | 69,000 |
> | Total | 173,000 |
>
> • • • • •
>
> In connection with the outstanding stock, it is our further understanding that the Marshall stock is under option to purchase by you or the Company at $12.00 per share, and the 69,000 shares, or a substantial part thereof, have been or will be acquired by you at $17.50 per share." (Ex. 278, R. 1607-08.)

This discloses Black's determination in March of 1945 to acquire the balance of the shares.

Shortly after Black's receipt of this letter from his accountants, Ives contacted the Aledo people and told them that Black had directed him to get in the balance of their stock. (R. 687.) Spencer Berglund, who had lived in Aledo but later moved to Florida, received the same instructions from Ives by wire dated August 29, 1945:

> *"Sold producing property Black-Marshall Oil Company twelve dollars share, kept all Landowners Royalty Company. Sign stock in blank forward Fourth National Bank, Wichita, Kansas care Arthur Kincade, immediately. Must be closed September first."* (Ex. 81, R. 1538.)

In response to this same misrepresentation, the Aledo people turned in the remainder of their stock and Ives forwarded it to Black at Great Bend, Kansas. (R. 164-66, 171, 202-03, 248, 270-71, 282, 311, 364, 395-96, 425-26, 449, 452, 478, 497, 509-10, 523, 538, 548, 595, 928, 943; Ex. 12, R. 1532; Ex. 81, R. 1538.) On October 14, 1945, Ives advised Black that he had forwarded "the balance of the outstanding common stock held in this community." (Ex. 86, R. 1539-40.) Black-Marshall checks were then sent out in the amount of $12.00 per share and the funds thus used were charged as an advance to Black. (Ex. 108, 109, 110, R. 1576-79; Ex. 288, R. 1613; R. 871-72.)[4]

In the meantime, Black wrote to one Allen James at Chicago in an effort to get some stock held by Mr. George Ball of Muncie, Indiana. In this letter Black stated:

---

[4] The trial court found that Ives made these misrepresentations, delivered the shares obtained to Black of Black-Marshall, and distributed the payments. (Findings VII, VIII, Petition, App. pp. 7-13.) The trial court found, however, as to both 1944 and 1945 that "These misrepresentations were made by Ives without solicitation by Black and without Black's knowledge." (Petition, App. pp. 10, 13.) The Court of Appeals assumed this to be true in holding Ives' misrepresentations to be legally imputable to Black on principles of agency. (Petition, App. p. 58.)

"I tried to call you on the phone today only to find you were out of town. I am anxious to know if it is possible to buy the stock held by Mr. Ball or any of the other stockholders we acquired through your group. I am working on a deal to sell the Company or rather the stock of the Company and *have all the other shareholders lined up.* I have never approached any of your crowd, as I feel you can better handle them than I." (Ex. 25, R. 296; emphasis added.)

Black testified with respect to this letter as follows:

"Q. * * * But in any event you did tell Allen James that you had all the other stockholders lined up as of August 16th, 1945, didn't you? A. I believe I did, yes.

"Q. And the only way you could have the Aledo people lined up was through Dale Ives? A. That is right." (R. 1344.)[5]

The Aledo people had now been eliminated, but some of them felt that Black, as the President of the Company, might be able to furnish some information about the transaction. In the fall of 1945, Dr. Wadleigh wrote to Black and asked for further details about the sale described by Ives. (R. 204.) Black then called Ives and asked for his advice as to what Wadleigh should be told. (R. 694-95.) Ives' reply to this call is contained in his letter to Black on November 10, 1945:

"Regarding the Wadleigh letter I would suggest that you write and tell him that the entire assets of the Black-Marshall Oil Co. were sold except the property not developed in the Landowners Royalty Co.

[5] Despite the undisputed facts as to the long-established relationship between Ives and Black in dealing with the Aledo group the trial court concluded that: "The evidence does not establish that Mr. Ives was the agent of Mr. Black." (Conclusion of Law VI, Petition, App. p. 18.) Reversal of this conclusion of law was the principal ground for the decision of the Court of Appeals that Ives' false representations are legally imputable to Black. (Petition, App. pp. 58-59.)

> which cannot be developed for two years due to our tax situation under the sale. I have told the others the same thing and that at the end of two years if any developing is done on the Landowners Royalty property we will have to put up the money, by we I mean the old stockholders of the origi al Company." (Ex. 12, R. 1532-33.)

Black admitted the receipt of this letter. (R. 1354.) It is impossible to overstate its significance, for at the time Black received it he had Ives' previous letter of October 14, 1945, advising him that Ives had succeeded in obtaining "the balance of the outstanding common stock held in this community." (Ex. 86, R. 1539-40.) Practically all of this stock, including that temporarily transferred to Gill and Kincade, was in Black's lock box at that time, subject to his unquestioned dominion and control.[6] (R. 1351-52, 1354, 1363-64, 878, 1093-94, 1096.)

Dr. Wadleigh did not receive any reply to his letter to Black. (R. 204, 1387.)

Black had thus succeeded, as a result of Ives' misrepresentations, in "eliminating the greater part of a large family of shareholders." In the accomplishment of this objective, Black-Marshall funds were used and Black's stock account was charged $831,483.06. (Ex. 288, R. 1613; R. 870-73, 1554.)

In 1947 Black realized the benefits of these transactions by a sale to N. C. R. A. Preliminary to and in preparation for the sale, Black caused to be transferred to himself 11,714 shares held as street stock on Certificate No. 398. (Ex. 100, R. 1567-68.) This was part of the stock fraudu-

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[6] The trial court found that Black received Ives' letter and took no action as a result of it. (Finding X, R. 128, Petition, App. p. 14.) This finding provided another sufficient ground for the conclusion of the Court of Appeals that Ives' false representations are legally imputable to Black. (Petition, App. pp. 59-60.)

lently acquired from the Aledo people in 1944. (R. 574-75, 698-99, 1375-76.) The remainder of the street stock, some 56,000 shares, was marked retired for the purpose of balancing Black's stock account. (R. 1382, 1193, 1098-99.) Since Black at that time held a preponderant majority of the stock in his own name, this purported retirement achieved substantially the same effect as a direct transfer of that stock to Black. (R. 1098-99.) In further preparation for the sale, Black caused the Company's minutes to be reviewed and revised. (R. 782-85, 960.) He then transferred 62,126 shares to N. C. R. A. for $51.06 per share; 3,000 shares held by Ives, as Executor of the Boyd Estate, were also transferred to N. C. R. A. (Ex. 99, R. 1563-65.) This gave N. C. R. A. a controlling interest and it proceeded to dissolve the corporation. (R. 1135.) The other stockholders had previously agreed to convey their distributive interests in the assets to N. C. R. A. for an amount equal to $51.06 per share and did so. (R. 1134-35.)

From the distribution of $51.06 per share, Ruth F. and William F. Black received $234,928.74; Black received $2,814,929.06; and Ives, as Executor of the Boyd Estate, received $135,930.00. (Ex. 291, R. 1633-34, 1639.) An escrow fund of $497,819.21 was also created in which the interest of Ruth F. Black was $39,123.29, the interest of W. H. Black $357,224.50 and the interest of Ives, as Executor of the Boyd Estate, $17,250. (Ex. 284, R. 854.)

Upon discovery of the manner in which they had been victimized by Black and Ives, the Aledo group confronted Ives, who then admitted the hoax that he and Black had effected in 1944 and 1945. (R. 170-71, 205-06, 312-13, 398-99, 511, 539.) Shortly thereafter these cases now before this Court were instituted.

The trial court's Findings of Fact[7] leave no doubt of the basic points that the Aledo shares were acquired by Ive's fraudulent misrepresentation and were delivered to Black (Findings VII and VIII, Petition, App. pp. 7-13), that if Black did not himself contrive and direct the fraud, as respondents believe, he acquired full knowledge that the shares were obtained through gross misrepresentations but did nothing (Finding X, Petition, App. p. 14) and that he later reaped an immense personal profit as a result of the fraudulent acquisition of those shares. (Finding XII, Petition, App. pp. 15-16.) The trial court also found, however, that Ives' misrepresentations as to the sale of producing properties were made without solicitation by Black and without Black's knowledge (Finding VII, Petition, App. p. 10) and that the value of the respondents' shares when purchased in 1944 and 1945 was not greater than the price which respondents received. (Finding XIII, Petition, App. p. 16.) Its denial of any recovery was based on those latter findings and on the Conclusions of Law that Ives was not Black's agent (Conclusion of Law VI, Petition, App. p. 18), that there was no conspiracy between Black and Ives (Conclusion of Law V, Petition, App. p. 17), that Black

[7] Petitioners' emphasis on the "careful detail" in which the trial court set forth its findings of fact (Petition, p. 23) must be considered in the light of the fact that the trial court adopted petitioners' suggested findings of fact verbatim, including the record references. (Compare R. 77-93 with R. 115-132.) It should also be noted that the "detailed references to the testimony" (Petition, p. 27) were in the form "D. . ." rather than "Tr. . ." (R. 115-32). Those references were to a narrative digest of the testimony submitted by petitioners' attorneys in the trial court and objected to as inaccurate by respondents. That narrative summary is not in the printed record. When petitioners state, in connection with the trial court's Findings of Fact and Conclusions of Law as printed in the Appendix to the Petition, that "record references have been changed to correspond with the printed record" they necessarily mean that references to the narrative digest of the testimony have been converted into references to the actual testimony in the printed record. The references printed in the Appendix are not, therefore, the trial court's actual references.

was not guilty of any fraud (Conclusion of Law VII, Petition, App. pp. 18-19) and that the individual respondents suffered no injury from the sale of their stock. (Conclusion of Law VIII, Petition, App. p. 18.) The court also concluded, without further explanation, that the derivative claims should be dismissed. (Conclusion of Law XI, Petition, App. p. 18.)

The Court of Appeals first held the defrauded respondents to be entitled to participate in a proportionate redistribution of the proceeds of the 1947 sale in Black's hands. It based this holding on three conclusions: (1) that Ives was Black's agent when he purchased the shares and Black was responsible as principal for Ives' misrepresentations even if he neither solicited them or knew of them when they were made; (2) that when Black learned of the misrepresentations by which the shares were acquired, as the trial court found he had, it became his duty to restore them; (3) that Black stood in a position of trust and confidence with respect to the Aledo group to which he was unfaithful. Judge Phillips concurred in the first of these three independent and legally sufficient conclusions, expressing no opinion on the others.

The Court of Appeals concluded, in addition, that since 32,457.50 of the shares sold by Black in 1947 for $51.06 per share had "beyond doubt" originally been issued to him "surreptitiously, covertly, and * * * fraudulently" they were not validly issued shares. In its first opinion it assumed that the corporation's receivers would participate on the basis of these shares in the proportionate distribution of the proceeds of the 1947 sale. When petitioners called the court's attention to the fact that this recovery by the receivers might produce an unjustified return of consideration to N. C. R. A., the court modified its opinion to hold that the invalid shares should not participate at all in the distribution of the proceeds of the 1947 sale.

Faced with that record, counsel for petitioners take the responsibility of imputing bad faith to the Court of Appeals in holding that the proceeds of the 1947 sale in Black's hands should be re-distributed among Black and the defrauded respondents on the basis of their respective holdings of validly issued shares.

ARGUMENT.

I.

PETITIONERS' JURISDICTIONAL POINT INVOLVES NO CONFLICT AND IS WITHOUT MERIT.

Petitioners' jurisdictional point has at most a very limited application in this case. They do not contend that the court lacked jurisdiction of the action or of the claims of the original parties but only that the court erred in allowing additional members of the class of defrauded stockholders to intervene without requiring each to meet the requirements for diversity jurisdiction with respect to his claim. Nor do they contend that any of the interveners failed to meet the requirement as to jurisdictional amount. They claim only that the citizenship of the interveners is in "considerable confusion" and assert the necessity of a remand of the case for a "determination of fact regarding citizenship." (Petition, pp. 18-19.) Their claim of confusion as to citizenship is, however, based on reference solely to the pleadings. (Petition, p. 18.) The testimony establishes clearly that only two of the numerous intervening respondents have a common citizenship with petitioners. These are Mr. and Mrs. Constant who, although originally members of the Aledo, Illinois, group of defrauded stockholders, later, like petitioners, moved to California. The testimony clearly negates such common citizenship as to all the other defrauded interveners and establishes the Illinois citizenship of most of them.[8]

[8] In connection with this proof of Illinois citizenship, petitioners refer to the fact that the Black-Marshall Oil Company is an Illinois corporation. They concede that it is not a party but suggest that it should be a necessary party defendant. They make no attempt, however, to deal with the fact that it was represented by receivers, appointed by the Federal District Court for the Southern District

(R. 450, 465, 532, 543, 278-79, 587, 264, 322, 517-18, 504, 360, 415, 921, 936.) Thus on the record the jurisdictional point that petitioners raise affects only the claims of Mr. and Mrs. Constant, two intervenors holding a total of 1,850 shares out of a total of 40,748 shares held by all respondents.

This point, on which petitioners now "paramountly" rely in this Court as a reason for granting the writ, was not raised by them at any stage of the proceedings below. As petitioners state, this does not preclude their suggesting it to this Court. It does, however, reveal the point to be the product of a last minute quest for a more colorable reason for praying certiorari than was provided by questions of state law decided against them below and now embodied in their second point. Its relative unimportance in this case suggests that it is now of concern to petitioners only as a tenuous device for obtaining the review of the evidence and of questions of state law presented by their second point.

No Conflict Exists on the Jurisdictional Question.

With respect to their jurisdictional point, petitioners claim that the decision of the court below conflicts with this Court's decision in *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, and the decision of the Court of Appeals for the Second Circuit in *Steele* v. *Guaranty Trust Co.*, 164 F. 2d 387. (Petition, p. 8.) Petitioners' contention overlooks the fact that these cases involved the *separate and distinct* claims of *original* parties, and it was for that reason that, in both cases, each party was required independently to meet the jurisdictional requirements.

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of Illinois, who intervened as plaintiffs in support of the individual and derivative claims. (R. 25-29, 51.) They do not attempt to explain why, if it were a party, it would be aligned as a defendant to defeat jurisdiction although its interest would be that of a plaintiff and it is not under antagonistic control. Nor do they attempt to explain how its citizenship could affect jurisdiction over the individual claims.

Here, on the other hand, the parties in question are interveners, jurisdictional requirements having been fully met by the original parties, and the claims of all members of the class are interdependent. The significance of this distinction is well illustrated by a subsequent decision of the Court of Appeals for the Second Circuit, *Dickinson* v. *Burnham*, 197 F. 2d 973, which petitioners fail to discuss despite the fact that it was one of the decisions relied upon by the court below on this point. (Petition, App. p. 52.)

In the *Dickinson* case, the court dealt with the jurisdictional requirements for *intervention* in a class suit involving *interdependent* claims—the very issue presented by the strikingly similar facts of this case. There, two members of a class of stockholders had brought an action on behalf of the class to seek cancellation of stock on the basis of fraud and recovery of profits fraudulently realized by two individuals.[9] Some 70 additional members of the class subsequently intervened without regard to diversity of citizenship, and after trial a judgment was entered in favor of plaintiffs.

Upon appeal, one of the "procedural" questions presented was the very issue raised here, namely, whether the court had jurisdiction over claims of interveners who did not independently meet diversity of citizenship requirements. The district court had characterized the class action as "spurious." As to the bearing of this characterization on the procedural questions presented, the Court of Appeals said:

> "By making use of this euphonious, if mystic, label, the judge has let himself in for a considerable amount of trouble. For the procedural aspects of this appeal

[9] The action was originally instituted by one Dickinson to impress an equitable lien on certain stock of Petroleum Conversion Corporation, and the two stockholders intervened in that action in behalf of the class. See *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507.

are made to turn largely upon arguments and deductions drawn from this observation.

"The convenient use of the appellations 'true,' 'hybrid' and 'spurious' for determining the effect of a judgment in a class suit under F. R. 23(a) has become rather general; but these labels should not be pressed so far as to obscure the original meaning and purpose of the rule itself." (197 F. 2d at 978-79.)

Having recognized that the characterization of a suit as "true," "hybrid" or "spurious" is not necessarily determinative even of the effect of the judgment on the rights of absent members of the class, the court concluded that, in any event, the suit was in fact "hybrid." The Court said:

"* * * we are quite clear that the present suit falls neatly within subdivision (2) of the rule, dealing with disposition of a fund, and that the court had full power to deal with it as it did, acting with great care and most equitably. * * *

"For what we have here is property held in constructive trust by reason of fraud perpetrated upon those who made the original contributions * * * it is also quite clear, as the Third Circuit has pointed out, that the disposition of a fund held in constructive trust comes within the 'hybrid' class, so that claims by non-appearing members can no longer be asserted against the original holders who are forced by the judgment to disgorge. *Pennsylvania Co. for Insurance, etc.* v. *Deckert*, 3 Cir., 123 F. 2d 979, 985; 3 Moore's Federal Practice 3441, 3468, 2d ed. 1948." (197 F. 2d at 979-80.)

In reaching that conclusion, the Court emphasized the fact that the judgment running to each claimant member of the class had to be calculated according to the following formula:

"A final decree should be entered according to each intervener claimant, * * * a judgment * * * in an amount which shall bear the same ratio to $176,245 and interest * * * as the amount of the intervener's claim bears to the total of the claims of the interveners allowed by the Court." (197 F. 2d at 978.)

Because of this interdependence of the several claims against the fund held in constructive trust, all the claims had to be tried in order to make possible a final settlement of any claim. The claims were not, therefore, separate and distinct.

Having so decided, the Court of Appeals then turned to the question of jurisdiction, saying:

> "The court found the diverse citizenship of the original parties and the interveners Burnham and Vaughan. This is sufficient for our purposes. *Townsend* v. *Bucyrus-Erie Co.*, 10 Cir., 144 F. 2d 106, 108. And it gave jurisdiction for adjudication of the issues between the class and the plaintiff and his co-conspirator, irrespective of citizenship of the subsequent interveners; the later distribution of the fund was merely an ancillary step in administration. 3 Moore's Federal Practice 3443, 2 Ed. 1948; Clark, Code Pleading 406, 2d Ed. 1947." (197 F. 2d at 980.)

The *Dickinson* case and the instant action present many similarities, the most significant of which is that both involve intervention by members of a class whose claims are not in fact separate and distinct but are interdependent. The judgment to which each member of the class is entitled in the present case is described by the court below as follows:

> "To determine the amount each successful appellant is entitled to recover, the trial court should apply in essence, the following formula: First, inquiry must be made to establish the number of validly issued shares of stock involved in the 1947 sale. Then, the value of each valid share so participating should be obtained by dividing the total dollar consideration paid by N. C. R. A. for the Black-Marshall assets by the number of such validly issued shares. Each shareholder is then entitled to judgment equal to the number of shares fraudulently procured by Black, less the amounts paid by Black to each shareholder in the fraudulent 1944-1945 transactions.

> "Validly issued shares involved in the 1947 sale must include any shares arbitrarily retired by Black prior to such sale, and of course must exclude the stock fictitiously issued, inasmuch as such fictitious issue is not entitled to share in the sale proceeds. And, the trial court in making these determinations should keep in mind that the overall object in view is to ignore any superficial book transactions and compensate appellant-stockholders in relation to their actual interests in the 1947 sale as evidenced by the number of shares fraudulently procured from them." (Petition, App. pp. 68-69.)

Thus, the amount of the judgment to which each member of the class is entitled depends on the total number of shares entitled to participate in the proceeds of the 1947 sale, held in constructive trust by Black. Because of this fact, the final disposition of the claim of any member of the class depends on the disposition made of the claims of the other members of the class. The situation in this respect is precisely the same here as in the *Dickinson* case.

Faced with intervention in a class suit involving claims not in fact separate and distinct, but interdependent, the court below and the Court of Appeals for the Second Circuit both treat the interventions as ancillary and do not require each intervener independently to meet the requirements for diversity jurisdiction with respect to his claim. With respect to the facts here presented, therefore, there is no conflict of decision. Indeed, there is a consistent decision of the very court as to which a conflict is asserted.

Both Courts were clearly correct. In the present case, as in the *Dickinson* case, allowing the other members of the class to intervene without requiring each independently to meet the requirements for diversity jurisdiction was necessary in order that the court might dispose of the claims already before it, against a fund held in constructive trust, completely, effectively and equitably. In

these circumstances the jurisdiction over the original claims fully supported the ancillary interventions. *Stewart* v. *Dunham*, 115 U. S. 61.

Petitioners' Argument Has No Bearing on the Jurisdictional Question.

Disregarding the *Dickinson* case and the equivalent facts of the present case, petitioners have devoted their argument to a narrow question which, although the subject of considerable academic debate, has had no practical importance in the nearly twenty years since the adoption of the Federal Rules. That question is whether, in the words of Professor Moore, "no independent jurisdictional ground is needed to support intervention in a class action, *even though the only basis for such action is the presence of a common question of law or fact affecting the several rights involved.*" (Petition, p. 15.) Petitioners contend that Professor Moore is wrong and, in effect, ask this Court to take this case in order to correct him. But they cannot properly raise that abstract question in this case. That question could be raised only in a case in which the only basis for a class action was the existence of common questions of law or fact in otherwise separate and distinct claims. Here, however, the claims, though several, are not separate and distinct, but are interdependent. One cannot be finally disposed of without at the same time passing upon the others, since the recovery upon each share of stock necessarily depends upon the total number of shares entitled to participate in the proceeds of the fraud.

The most that petitioners' argument establishes is that some class suits within Rule 23(a)(3) may involve such separate and distinct claims that to permit members of the class to intervene without independently meeting the

requirements for diversity jurisdiction would unduly extend federal jurisdiction. Petitioners certainly err, however, in assuming that if an independent jurisdictional ground is required to support intervention in some class actions within Rule 23(a)(3), it must be required in every such action.

This ascribes a jurisdictional significance to the provisions of Rule 23(a) which they clearly were not intended to have. By the express provision of Rule 82, whether a class suit is "true," "hybrid" or "spurious" under Rule 23(a) cannot change the jurisdictional requirements for intervention. The question in each case, once the federal court has acquired jurisdiction, is whether it is appropriate under the particular circumstances to allow ancillary intervention by other members of the class. This is strikingly illustrated by the fact, as observed by Professor Chafee, that *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, the leading case upholding ancillary intervention of non-diverse members of a class, was probably a "spurious" class action if judged by the classification of rights set forth in Rule 23(a).[10]

Petitioners quote Judge Prettyman's opinion in *Knowles* v. *War Damage Corp.*, Petition, pp. 11-12, to the effect that the several claims involved in a "spurious" class suit "*may* be several and *not* interdependent." However, as this statement implies, they may also be interdependent, though several. If a particular action, as is true here, involves claims that are interdependent and is therefore within the principle of ancillary intervention, the fact that some class actions under Rule 23(a)(3) may involve separate and distinct claims not within that principle is immaterial.[11]

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[10] Chafee, *Some Problems of Equity* 254, 255-56 (1950).

[11] The wisdom of not attaching jurisdictional significance to the classification of rights in Rule 23(a) is confirmed by the uncer-

The jurisdictional question argued by petitioners thus is simply not presented by the facts of this case.

The District Court decided to deal with a controversy over which it clearly had jurisdiction completely and as a whole. The court did so by including among the interventions which it allowed those of two former residents of Aledo, Illinois, the principal place of petitioners' operations, even though they had since moved to California. The Court of Appeals correctly upheld that action. Since the claims of all of the class who desired to intervene against petitioners were interdependent the court could not have done complete justice even to the original plaintiffs and the other interveners unless it had permitted their intervention. Nor would it have made any sense for the court to have required that Mr. and Mrs. Constant and the State of California suffer the burden and expense of duplicating the case in the courts of that State. There it would have been necessary to establish not only the Constants' individual claims but also the facts as to the entire fraud, just as respondents did below. Even then the California court could not finally have disposed of the Constants' claims because of their interdependence as to amount with the claims of the other defrauded stockholders in the federal court.

The jurisdictional question argued by petitioners not being relevant here, the statement of the Court of Appeals for the Second Circuit in the *Dickinson* case applies equally here: "Obviously complete settlement of this long pending dispute was desirable and in the interest of justice." (197 F. 2d at 980.)

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tainty which exists under the present Rule as to whether a given class action is "true," "hybrid" or "spurious," and as to the substantive consequences of holding it to be one type or another.

II.

THE DECISION OF THE COURT OF APPEALS IS BASED UPON ITS SOUND CONCLUSIONS OF LAW ON UNDISTURBED FINDINGS AND UNDISPUTED FACTS.

Petitioners contend that the Court of Appeals disregarded the requirement of Rule 52(a) of the Federal Rules of Civil Procedure that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses * * *." In support of this contention they refer to a number of cases under Rule 52(a) and assert generally, at the beginning and end of their argument, that the Court of Appeals wrongfully set aside the trial court's findings on key questions of fact involving conflicting testimony by Black and Ives. (Petition, pp. 21, 32-33.) Their argument is devoted for the most part, however, not to this point but to the unrelated contention that various conclusions of law reached by the Court of Appeals on the basis of undisturbed findings and undisputed facts were erroneous. These conclusions of law constitute the real basis of the Court of Appeals decision and the asserted errors therein can be the only real basis of the petition.

This becomes very clear when petitioners' various contentions as to law and fact are considered in relation to the ultimate conclusions on which the Court of Appeals decision is based. These are, first, that petitioner Black is liable to account to the defrauded respondents for the proceeds of the 1947 sale of Black-Marshall and, second, that 32,457.50 of the shares claimed by Black were invalid when issued and not, therefore, entitled to participate in the distribution of those proceeds. Both these conclusions are supported by undisturbed findings and undisputed facts and neither depends on setting aside any findings of fact.

The holding of the Court of Appeals that Black must account to the defrauded respondents for the proceeds of the 1947 sale does not depend on the setting aside of any of the trial court's findings of fact but is, on the contrary, fully supported by the trial court's findings that Ives induced the sale of the stock by misrepresentation and delivered it to Black, that Black learned of the misrepresentation but did nothing, and that he subsequently dealt with it in such a way as to realize an immense personal profit.

The principal basis of this holding is the conclusion of law that Ives' misrepresentations are imputable to Black on elementary principles of agency. This was the Court's unanimous conclusion.

In reaching that conclusion, the Court fully recognized the limitations imposed by Rule 52(a). The majority opinion stated:

> "We first consider whether Ives' false representations are legally imputable to Black, and in that regard the findings of the trial court on the disputed issues of fact are, of course, binding here; its ultimate appraisal of all the facts is entitled to great weight, and its conclusions thereon will not be disturbed unless from a consideration of the whole record we are convinced that they are clearly erroneous. *United States* v. *United States Gypsum*, 333 U. S. 364; *United States* v. *Waymire*, 10 Cir., 202 F. 2d 550; *McAllister* v. *United States*, 348 U. S. 19; *United States* v. *Oregon Medical Society*, 343 U. S. 326." (Petition, App. p. 53.)

The conclusion of the majority of the Court on this question was then stated as follows:

> "It may be that Black did not instruct Ives what to tell the Aledo Group in order to get the stock. Indeed, for the purposes of agency, we may assume that he did not know that false representations were being made. It is manifestly clear, however, from Black's own words and conduct, that Ives acted as his

agent in the procurement of the stock both in 1944 and 1945. And it is a familiar and universally accepted rule that a principal is liable for the frauds and misrepresentations of his agent within the scope of his authority or employment even though he had no knowledge of such representations. Otherwise stated, 'although the principal may not have actually authorized the particular fraudulent act, yet he is responsible for the fraud of the agent if he has entrusted to the agent a matter which puts the agent in a position to perpetrate the fraud complained of while the agent is executing the agency transaction within the scope of his employment.' 2 Am. Jur., Agency §363; see also Restatement Agency § 261; *Anheuser-Busch* v. *Grovier-Starr Produce Co.*, 128 F. 2d 146; *Cox* v. *Pabst Brewing Co.*, 128 F. 2d 468; *Siedhoff* v. *Campbell*, 141 Kan. 255, 40 P. 2d 404. The principal is liable to one who relies upon the deceitful representations of the agent, 'if those representations are apparently authorized, or usually accompany or are incidental to transactions which he is authorized to conduct, provided the other party has no notice that the representations are unauthorized.' 2 Am. Jur., Agency § 362; see also Restatement Agency, Sections 257, 258." (Petition, App. pp. 58-59.)

This conclusion was fully concurred in by Judge Phillips, as follows:

"That Ives made the alleged false representations with respect to the sale of the assets of the B-M Company to members of the Aledo Group is conceded. The trial court found that such representations were made by Ives without solicitation by William H. Black and without the knowledge of William H. Black. However, Black testified that he told the Aledo Group that Ives was his agent in all matters with respect to the B-M Company, and especially for the purpose of furnishing information to the Aledo Group. Therefore, it is my opinion that Black was estopped to deny Ives' agency and that Ives had apparent or ostensible authority to furnish information on Black's behalf

to the Aledo Group with respect to the B-M Company and that the representations made by Ives to the Aledo Group were within the scope of the apparent or ostensible authority of Ives and Black was bound thereby. On that ground and that ground alone, I concur in the majority opinion, insofar as it reversed the judgment below, with respect to the claim of the Aledo Group to recover from William H. Black for the injuries suffered by the Aledo Group on account of the alleged false and fraudulent representations of Ives." (Petition, App. pp. 72-73.)

The Court of Appeals thus unanimously reversed the trial court's Conclusion of Law that: "The evidence does not establish that Mr. Ives was the agent of Mr. Black." (Conclusion of Law VI, Petition, App. p. 18.)

Petitioners do not now dispute the correctness of that dispositive action of the Court of Appeals. They likewise disregard a complementary conclusion of the Court of Appeals, which was as follows:

"Moreover, the record shows without much doubt that Black knew of Ives' false representations and with such knowledge accepted the benefits without raising a hand to repudiate or deny them. Indeed, the court found that on November 10, 1945, Ives advised Black of the misrepresentations and that Black took no action thereon. The record shows other specific instances in which Ives' representations were brought home to Black. In their brief the appellees concede that Black learned of Ives' misrepresentations in the Fall of 1945 but exonerate him by saying that he did not know what to do about it. But, 'he ratifies who does not restore.' *Maryland Casualty Co.* v. *Beebe*, 54 F. 2d 743, and cases cited. Black kept the stock with knowledge of the fraud. His profits from the sale were the fruits of the fraud, and equity will require him to account." (Petition, App. pp. 59-60.)

This conclusion rests on facts found by the trial court (Petition, App. p. 14) and is clearly correct as a matter of law.

Having ignored these sufficient bases for the reversal on this point, petitioners complain only of the Court's further statement that the stock was obtained "in consummation of what we hold to be Black's scheme to defraud." (Petition, App. p. 62.) They complain (Petition, pp. 23-25) that this statement conflicts with the trial court's conclusions of law that Black was not guilty of any fraud or conspiracy to defraud and its findings that: "These misrepresentations were made by Ives without solicitation by Black and without Black's knowledge." (Findings VII, VIII, Petition, App. pp. 10, 13.) Even if these conclusions and findings were not clearly erroneous, the statement of the Court of Appeals, after it had determined Ives' misrepresentations to be imputable to Black as a matter of law on principles of agency, would not provide an occasion for exercise of this Court's jurisdiction. As indicated by Judge Phillips' opinion it was not necessary to determine whether Black or Ives or both together conceived the scheme to defraud. It was enough that their cooperative action had in fact defrauded the Aledo group of their shares and that Black profited immensely thereby. Black's duty to account for his profits does not depend on his personal guilt nor is Black's obligation reduced if Ives is assumed also to have profited. The question of conspiracy is entirely immaterial. (*Cf.* Petition, pp. 7-8, 20-21.)

Petitioners' principal argument bearing on Black's liability to account concerns a question of Illinois law. They contend that respondents' receipt of "the full value of their stock" in 1944 and 1945 requires a holding, under Illinois law, that they were not damaged by the misrepresentations by which they were induced to sell it. What petitioners thus assert is, in substance,

that Black is entitled to a presumption that the respondents' shares could have been acquired in 1944 and 1945 at $10 and $12 per share without the misrepresentations.[12] The Illinois cases cited by petitioners support no such unsound proposition.[13] The Court's cases support its holding.

With respect to the Court of Appeals' conclusion that 32,457.50 of the shares claimed by Black are invalid promotional stock and therefore not entitled to participate in a proportionate distribution of the proceeds of the 1947 sale, petitioners also rely primarily on a question of state law. They contend that the Court thus erroneously allowed the individual respondents to recover directly on a cause of action derived from the corporation and "whose fruits could lawfully accrue only to the corporation." (Petition, pp. 28-32.) They contend, in effect, that the corporation's receivers should share in the proceeds of the 1947 sale on the basis of the 32,457.50 invalidly issued shares, although they admit that this would "require petitioner to pay back the proceeds of the sale for the benefit, in large part, of the purchaser of the shares and majority shareholder, N. C. R. A." (Petition, p. 30.) It was, in fact, petitioners' objection to such an unjust enrichment of N. C. R. A. which led the Court of Appeals to modify its opinion to deny the receivers' claim. Having thus induced the Court of Appeals to deny a corporate recovery on the invalid shares, petitioners now seek to

[12] Black could have established whether that was true as to the 1945 sales by making full disclosure and an offer to restore petitioners' stock after, as the trial court found, he learned of Ives' misrepresentations in 1945 when he still had control over their shares.

[13] One of the cases cited actually upholds a complaint, for cancellation of a deed to real estate, in which it was not alleged that the price paid was less than the market value but only that the use to which the buyer intended to put the property had been misrepresented. *Roda* v. *Berko*, 401 Ill. 335, 81 N. E. 2d 912 (1948).

eliminate the equitable alternative remedy adopted by the Court.

Assuming the correctness of petitioners' basic proposition as to the nature of the alternative remedy adopted by the Court of Appeals,[14] they clearly err in characterizing its holding as "wholly original." (Petition, p. 29.) In so doing, they simply disregard a large body of authority authorizing individual recovery when a corporation has been dissolved and liquidated or when a corporate recovery would produce an inequitable result. The Court of Appeals referred to *Home Fire Ins. Co.* v. *Barber*, 67 Neb. 644, 93 N. W. 1024 (1903). Other cases which it might also have cited are: *Ervin* v. *Oregon Ry. & Nav. Co.*, 20 Fed. 577, 581 (C. C. S. D. N. Y., 1884); *Backus* v. *Finkelstein*, 23 F. 2d 357, 366 (D. Minn., 1927); *Lebold* v. *Inland Steel Co.*, 125 F. 2d 369 (7 Cir., 1942); *Gardiner* v. *Automatic Arms Co.*, 275 Fed. 697 (N. D. N. Y., 1921); *Brown* v. *De Young*, 167 Ill. 549, 47 N. E. 863 (1897); *Snyder* v. *Aetna Construction Co.*, 272 Ill. App. 591 (1933); *Dunlay* v. *Avenue M. Garage & Repair Co.*, 253 N. Y. 274, 170 N. E. 917 (1930); *Sautter* v. *Fulmer*, 258 N. Y. 107, 179 N. E. 310 (1932); *Commonwealth Title Ins. & Trust Co.* v. *Seltzer*, 227 Pa. 410, 76 Atl. 77, 80 (1910); *Porter* v. *Healy*, 244 Pa. 427, 91 Atl. 428, 432 (1914); *Hechelman* v. *Geyer*, 252 Pa. 123, 97 Atl. 193 (1916); *Upton* v. *Southern Produce Co.*, 147 Va. 937, 133 S. E. 576 (1926). These cases establish the correctness of the Court of Appeals' holding on this point.

The basis of the Court of Appeals' holding that the 32,457.50 shares of Black-Marshall stock were invalid was its conclusion that "it is also clear beyond doubt

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[14] The decision may certainly be construed as ordering a cancellation of the invalid shares in the corporate actions followed by a proportionate distribution of the proceeds of the 1947 sale on the basis of the validly issued shares.

that it was issued surreptitiously, covertly, and we say fraudulently, to Black." (Petition, App. p. 67.) Petitioners imply, without directly stating, that this is inconsistent with the trial court's findings that:

> "• • • a total of 9,055 shares of preferred stock and 122,500 shares of common stock were issued in exchange for the five Kansas leases • • •" (Finding III, Petition, App. p. 6.)
>
> "Black and Marshall were issued 10,000 shares common and 1,000 shares preferred individually, and were issued 64,870 shares which were carried on the books as Black *et al.*, for the partnership interest of Black and Marshall in the original five Kansas leases." (Finding VI, Petition, App. p. 7.)

The Court of Appeals' conclusion is not in the least inconsistent with these findings, however. There was no question that the 64.870 shares referred to, which included the 32,457.50 shares in question, were issued to Black and that they were charged on the books of the Company against the Kansas leases, as were all the other shares issued to Black and the members of the Aledo group. Nor was there any question that Marshall, Black and the members of the Aledo group associated with Black all had recognized interests in the Kansas leases. Black lawfully received 10,000 shares of common and 1,000 shares of preferred for his recognized interest as part of the original issue. The Court of Appeals' conclusion is not inconsistent with these facts. It was also undisputed however, that the 64,870 shares were not validly issued when the other original shares were issued (Black so testified, R. 1286, 1287-89) but were subsequently issued under circumstances which Black did not "propose to explain, because I can't explain it." (R. 1292, 1290.) Although Black contended that he was entitled to those shares for his interest in the Kansas leases, he did not claim that he had asked for them or that the other incorporators had ever agreed that

he should have them. Nor did the trial court so find. So far as appeared from Black's own testimony, he simply took them on the basis of his opinion that he was entitled to have them. (R. 1287-92.) The most that petitioners now claim is that they were in fact issued to him and that the other stockholders could have learned from various corporate records that he had taken them. (Petition, p. 27.) In these circumstances, the Court of Appeals' conclusion that the shares were issued surreptitiously, covertly and fraudulently not only does not conflict with the trial court's findings referred to by petitioners but is unassailable on the record.

Their argument thus makes it evident that what petitioners are primarily seeking here is an opportunity to reargue questions of state law on which the Court of Appeals rejected their contentions.

CONCLUSION.

For purposes of this petition, petitioners have stated a much mooted jurisdictional question and a question as to the scope of review of findings of fact under Rule 52(a) of the Federal Rules of Civil Procedure which, whatever their abstract interest, are not presented for decision on the record in this case. The questions really presented and upon which petitioners would necessarily rely for a reversal if certiorari were granted, are questions of state law as to which petitioners do not even claim such importance as to justify their reconsideration by this court. On these questions, moreover, the decision of the Court of Appeals was correct.

For the foregoing reasons, this Petition for Certiorari should be denied.

Respectfully submitted,

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